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E-FILED MARCH 4, 2009

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re: USA COMMERCIAL MORTGAGE COMPANY,
Debtor.

CASE NO. BK-S-06-10725 LBR
CASE NO. BK-S-06-10725 LBR
CASE NO. BK-S-06-10726 LBR
CASE NO. BK-S-06-10727 LBR
CASE NO. BK-S-06-10728 LBR
CASE NO. BK-S-06-10729 LBR

In re: USA CAPITAL REALTY ADVISORS, LLC,
Debtor.

Chapter 11

In re: USA CAPITAL DIVERSIFIED TRUST DEED
FUND, LLC,

Jointly Administered Under
Case No. BK-S-06-10725 LBR

Debtor.

**MOTION TO INTERPRET THE
USA CAPITAL
REORGANIZATION
PLAN WITH RESPECT TO
PROFESSIONALS LIABILITY**

In re: USA CAPITAL FIRST TRUST DEED FUND, LLC,

Debtor.

In re: USA SECURITIES, LLC,

Hearing Date: April 10, 2009
Hearing Time: 9:30 a.m.

Debtor.

Comes now, Alfred Olsen, Jr., by and through his attorney Jeffrey Cogan Esq. and files
this Motion to Interpret certain provisions of the USA Capital Plan of Reorganization with respect
to the rights of the Creditors to pursue claims against various professionals, and in

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particular, Mesirow Financial Services Inc. ("Mesirow")

DATED this 4th day of March, 2009.

JEFFREY A. COGAN, ESQ., LTD.

By /s/ Jeffrey A. Cogan
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Attorney for Alfred Olsen, Jr.

POINTS AND AUTHORITIES

I.

STATEMENT OF ISSUE

Alfred Olsen, Jr. is a creditor in the USA Capital Bankruptcy and owns shares in Diversified Trust Deed Fund which currently has an approximate value of \$ 186,000.00 excluding accrued interest. Mr. Olsen is seeking an interpretation from the Court on as to the meaning of certain Plan provisions as follows:

(A) Whether the Plan grants professionals employed by the estate, and in particular Mesirow Financial Services LLC, the former Chief Restructuring Officer, has *absolute immunity* from law suits filed by creditors of the estate.

(B) Whether the Plan absolutely prohibits law suits against Plan professionals, and in particular Mesirow, by creditors of the estate for negligence or lack of good faith pursuant to the injunction provisions of the Plan.

II.

FACTUAL BACKGROUND

On April 13, 2006, the USA Capital companies filed Chapter 11 Petitions in the United States Bankruptcy Court for the District of Nevada. Mesirow was appointed the Chief Restructuring Officer under the Plan, with Thomas Allison serving as its managing member.

1 The USA Capital bankruptcy was complex and involved thousands of creditors that were
2 defrauded out of their investments by its two owners: Thomas Hantges ("Hantges") and Joseph
3 Milanowski ("Milanowski"). During the bankruptcy, evidence was produced which showed the
4 theft of millions of dollars of investors monies for the personal benefit of Hantges and
5 Milanowski, years before the companies actually filed the bankruptcy. Additionally, USA Capital
6 and its officers were being investigated by the Securities and Exchange Commission for financial
7 improprieties just prior to the bankruptcy filing with sanctions being levied against its CEO,
8 Hantges.

9 Because Mesirow was retained by USA Capital prior to the filing of the Chapter 11
10 Petitions, Mesirow presumably knew about the legal problems of USA and past investigations.
11 Additionally, Mesirow had the opportunity to review USA Capital financial records before the
12 bankruptcies were filed and presumably knew that the company was experiencing financial
13 difficulties.

14 During the time Mesirow served as Chief Restructuring Officer, Mr. Allison, made various
15 representations to the creditors, to wit:

16 a) That Hantges and Milanowski had "***diverted***" monies (instead of stolen from investors)
17 and that he was "***optimistic that he could recover the principal and interest for the investors***".

18 b) That Allison would "***restore the company to financial health, continue operations and***
19 ***bring it out of Chapter 11 bankruptcy as an ongoing concern***".

20 c) That notwithstanding the state of Nevada, Department of Business and Industry,
21 Division of Mortgage Lending stating that commingling of fund by USA principals, that "***brought***
22 ***to light some criminal things***", Allison continued to work with Hantges and Milanowski by
23 arranging a Fifty Eight Million Dollar (\$58,000,000.00) loan repayment agreement of funds
24 diverted by Milanowski and Hantges to their solely owned limited liability company, Investment
25 Partners LLC. This loan was never repaid.

26 Mesirow knew that Hantges and Milanowski owned a company known as Investment
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1 Partners LLC ("IP") and that funds from investors were used to fund approximately Three
2 Hundred Million Dollars (\$300,000,000.00) in real estate acquisitions for IP. Mr. Allison did not
3 move to include the IP assets in the bankruptcy estate until Great White Investments forced the
4 issued by filing a Five Million Dollar (\$5,000,000.00) Complaint with a *lis pendens* against the
5 Royal Hotel (as asset of IP, a subsidiary Hotel Sales, LLC in the Eight Judicial District Court).

6 As a result of the aforementioned actions and others, several creditors began questioning
7 whether legal action should be taken against Mesirow for its negligent handling of the bankruptcy
8 estate. Attached as ***Exhibit A***, is a letter addressed to Jacques Massa, General Partner of the
9 Jayem Family Limited Partnership dated December 22, 2007 wherein Mr. Massa is advised by the
10 Lewis and Rocca law firm and in particular Rob Charles, Esq. that the Plan provides that
11 Mesirow, Tom Allison and its agents "***would not be liable for their actions during the***
12 ***bankruptcy estate***". Mr. Charles cited Section VIII.A and Section IV.H of the Plan in advising
13 Mr. Massa that "***The Plan also contained injunctions that prohibit holders of claims against***
14 ***and equity interest in the Debtors from pursuing, among other things, property of the estate, the***
15 ***Debtors or their agents***" and that "***the confirmed plan of reorganization (the "Plan") contains***
16 ***releases in favor of MFIM and those releases were expressly approved by the Bankruptcy***
17 ***Court upon entry of the order confirming the Plan***".

18 Section VIII.A 1. of the Plan is attached hereto as ***Exhibit "B"*** provides that:

19 "except as otherwise expressly provided in the Plan, on and after
20 the Effective Date, none of the Debtors, the Debtors in Possession,
21 the Committees, the members of the Committees, nor any of their
22 employees, officers, directors, agents, or representatives, nor any
23 Professionals employed by any of them, shall have or incur any
24 liability to any Entity for any authorized act taken or authorized
25 omission made in good faith in connection with or related to the
26 Chapter 11 Cases or the Estates. . ."

27 It would seem under this provision that there is no absolute prohibition against liability for
28 actions taken by professionals, if in fact, it is proven that such actions were not taken in good
29 faith.

30 Section IV.H of the Plan is attached hereto as ***Exhibit "C"***. With respect to the limitation

1 of liability, said Paragraph IV.H provides that:

2 “Holders of an Claims against and Equity interest in the Debtors
 3 may not pursue (1) property of the Estate other than through Claims
 4 an Equity Interest allowance process; or (2) the Debtors or their
 5 agents”. . . “Except as otherwise provided in the Plan or the
 6 Confirmation Order, on and after the Effective Date all Entities that
 7 have held, currently hold or may hold a debt, Claim, other liability
 8 or Equity Interest against or in the Debtors that would be discharged
 9 upon confirmation of the Plan on the Effective Date but for the
 10 provisions of section 114(d)(3) of the Bankruptcy Code shall be
 11 permanently enjoined from taking any of the following actions on
 12 account of such debt, Claim, liability, Equity Interest or right: (A)
 13 commencing or continuing in any manner any action or other
 14 proceeding on account of such debt, Claim, liability, Equity Interest
 15 or right against assets or proceeds thereof that are to be distributed
 16 under the Plan, other than to enforce any right to a distribution with
 17 respect to such assets or the proceeds thereof as provided under the
 18 Plan; (B) enforcing, attaching, collecting or recovering in any
 19 manner any judgment, award, decree, or order against any assets to
 20 be distributed to creditors under the Plan, other than as permitted
 21 under subparagraph (A) above; and (C) creating, perfecting or
 22 enforcing any lien or encumbrance against any assets to be
 23 distributed under the Plan, other than as permitted by the Plan,
 24 provided that nothing contained herein shall limit the rights of any
 25 distributee under the Plan from taking any actions in respect of
 26 property distributed or to be distributed to it under the Plan.”

27 III.

28 LEGAL ARGUMENT

1 Notwithstanding the representations of attorney Rob Charles, Esq. to Jacque Massa in his
 2 letter, attached as *Exhibit “A,”* the injunction provisions seem to relate only to assets to be
 3 collected and distributed to creditors under the Plan and assets of the estate. Certainly any
 4 judgment or award to a creditor under the Plan of a damage claim for negligence against
 5 Professionals, as defined in the Plan, would not be not be considered assets to be distributed under
 6 the Plan, as contemplated.

7 When considering the express language of the Plan it seems that there is no absolute
 8 liability protection for Professionals, including Mesirow, but that said liability is conditional on a
 9 the actions of Professionals being taken in “good faith” (good faith is not defined under the Plan,
 10 nor is it defined in the Bankruptcy Code). However, the issue of whether Mesirow acted in good
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1 faith is not dispositive or relevant to decide the instant motion; the issue for this Court to consider
2 is whether any claimants or creditors of the estate have the legal ability to assert a claim against
3 Mesirow based upon an allegation that Mesirow did not act in good faith. Further, if such actions
4 were not taken in good faith, that Mesirow or other professionals could presumably be subject to
5 liability for their actions if they were negligent in the administration of the bankruptcy estate.
6 Section IV H of the Plan regarding injunctions, appears to create some confusion when viewed in
7 light of Paragraph VIII A of the Plan. For instance, if the injunction language is strictly construed,
8 why is it necessary to qualify the provisions of Paragraph VIII A by using the "good faith"
9 standard?

10 Certainly, it would seem that confusion exists under the terms of the Plan regarding these
11 paragraphs that have been cited by a bankruptcy estate attorney, Mr. Charles, for protecting
12 Mesirow and others from liability. Therefore, we request the court issue an interpretative ruling
13 on these provisions by responding to the following inquiries:

14 1. Are Professionals as defined in the Plan, absolutely exempt from liability for their
15 actions in administering the bankruptcy estate as to creditors of the estate?

16 2. Are all creditor claims against plan professionals barred by the injunction provisions of
17 the Plan as contained in Paragraph IV H ?

18 This court has retained jurisdiction to consider to hear matters pertaining to matters arising
19 under the Plan pursuant to Paragraph 5 D of the Plan. In light of the fact that Alfred Olsen, Jr. is
20 considering suing Mesirow and perhaps other professionals for negligence, it is necessary that this
21 Honorable Court determine the limitations of such actions or whether such actions are expressly

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1 prohibited by the Plan so Mr. Olsen and others are assured that there actions do not violate Title
2 11.

3 DATED this 4th day of March, 2009.

4 JEFFREY A. COGAN, ESQ., LTD.

5
6 By /s/ Jeffrey A. Cogan
7 Jeffrey A. Cogan, Esq.
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EXHIBIT "A"



Rob Charles
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Suite 600
Las Vegas, Nevada 89169

Direct Dial: (520) 629-4427
Direct Fax: (520) 879-4705
RCharles@LRLaw.com
Admitted in: Arizona and Nevada

Our File Number: 47419-00001

Received 12/22/07

December 10, 2007

Mr. Jacques Massa
Jayem Family Limited Partnership
Paradise Valley Court
Henderson, Nevada 89052

Re: Your letter of December 3, 2007

Dear Mr. Massa:

This letter responds to yours of December 3, 2007.

I am forwarding your letter to Brant Fyelling at Sierra Consulting Group, LLC. They are pulling together the documentation backing up the proofs of claim so that we can analyze the claims on a loan-by-loan basis. If your claim arises out of diverted principal, that claim is already set forth in the Debtor's schedules.

Your letter attacks lawyers, Tom Allison and probably me, personally. With respect, I understand that you are angry and what happened to your investments as a result of the conduct of Hantges and Milanowski, which is unconscionable. However, neither this law firm as counsel for the USACM Liquidating Trust, nor Sierra assisting with the claims analysis, will respond to the statements that you make.

I agree with your point that we cannot determine the claims unequivocally until the loans are either paid off or extinguished by other means. That is why we asked Sierra to take all of the proofs of claim and break them out on a loan-by-loan basis. Then, as the loans are collected, or not collected, we know the loss that the investors have suffered, and can make a reasonable recommendation to the Trust as to whether that loss was caused by misconduct for which USA Commercial Mortgage Company is responsible, or other factors, such as market conditions. It is our general view that USACM did not guarantee the loans, but it is also true that USACM through its principals, engaged in misconduct. The Trust will provide the Court with its recommendations on allowance of the claims on a loan-by-loan basis.



Mr. Jacques Massa
December 10, 2007
Page 2

As for the request the Trust sue Mesirow Financial Interim Management or Tom Allison, the Plan of Reorganization provided that Mesirow Interim Financial Management and its agents would not be liable for their actions during the bankruptcy case. The Lenders Protection Group was represented by counsel in connection with the confirmation hearing, and no objection to that provision of the Plan was made on behalf of the Lenders Protection Group. So, no, the Trust is not nor can it sue MFIM or Mr. Allison.

In conclusion, Mr. Fylling will respond to you with respect to the Trust's request for any additional information concerning your claims.

Sincerely,

A handwritten signature in black ink, appearing to be "RC" followed by a stylized flourish.

Rob Charles

RC/bp

Copy: Mr. Geoffrey L. Berman, Trustee
Mr. Brant Fylling
Marilyn L. Schoenike
Jennifer Cook, Esq.
John Hinderaker, Esq.

EXHIBIT "B"

1 Allowed Equity Interest shall be deemed timely made if made within five (5) Business Days of the
 2 Disputed Claim or Disputed Equity Interest or any portion thereof becoming an Allowed Claim or
 3 Allowed Equity Interest.

VIII.

MISCELLANEOUS PROVISIONS

A. Limitation Of Liability And Releases.

1. Limitation Of Liability.

4 Except as otherwise expressly provided in the Plan, on and after the Effective Date, none
 5 of the Debtors, the Debtors in Possession, the Committees, the members of the Committees, nor
 6 any of their employees, officers, directors, agents, or representatives, nor any Professionals
 7 employed by any of them, shall have or incur any liability to any Entity for any authorized act
 8 taken or authorized omission made in good faith in connection with or related to the Chapter 11
 9 Cases or the Estates, including objections to or estimations of Claims, disposition of assets, or
 10 formulating, determining not to solicit acceptances or rejections to, or confirming the Plan, or any
 11 contract, instrument, release, or other agreement or document created in connection with the Plan.

12 Consistent with section 1125(e) of the Bankruptcy Code, the Entities that have solicited
 13 acceptances or rejections of the Plan and/or that have participated in the offer, issuance, sale, or
 14 purchase of securities offered or sold under the Plan, in good faith and in compliance with the
 15 applicable provisions of the Bankruptcy Code, are not liable, on account of such solicitation or
 16 participation, for violation of any applicable law, rule, or regulation governing the solicitation of
 17 acceptances or rejections of the Plan or the offer, issuance, sale, or purchase of securities.

2. DTDF/FTDF Releases.

18 As of the Effective Date, in consideration for the obligations, subordination, modifications
 19 of rights and accommodations of FTDF, and the FTDF Estate, and except as otherwise expressly
 20 provided under the Plan, DTDF, the DTDF Estate and Post-Effective Date DTDF, on their own
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EXHIBIT "C"

1 issue preclusion, or any similar doctrine, the failure to list, disclose, describe, identify, or refer to a
 2 right, Claim, cause of action, defense, or counterclaim, or potential right, Claim, cause of action,
 3 defense, or counterclaim, in the Schedules, the Plan, the Disclosure Statement, or any other
 4 document Filed with the Court shall in no manner waive, eliminate, modify, release, or alter the
 5 Debtors or the Post-Effective Date Entities' rights to commence, prosecute, defend against, settle,
 6 and realize upon any rights, Claims, causes of action, defenses, or counterclaims that any of the
 7 Debtors or the Estates has or may have as of the Confirmation Date. The Debtors or the Post-
 8 Effective Date Entities may commence, prosecute, defend against, recover on account of, and
 9 settle all rights, Claims, causes of action, defenses, and counterclaims in their sole discretion in
 10 accordance with what is in the best interests, and for the benefit, of the Debtors or the Post-
 11 Effective Date Entities.

12 **H. Nondischarge Of Debtors And Injunction.**

13 This Plan provides for an injunction of certain actions against the Debtors. Holders
 14 of Claims against and Equity Interest in the Debtors may not pursue (1) property of the
 15 Estates other than through the Claims and Equity Interests allowance process; or (2) the
 16 Debtors or their agents.

17 Pursuant to section 1141(d)(3) of the Bankruptcy Code, the Confirmation Order shall
 18 not discharge Claims against or Equity Interests in the Debtors. However, no holder of a
 19 Claim or Equity Interest may receive any payment from or seek recourse against any assets
 20 that are distributed or to be distributed under the Plan, except for those assets required to
 21 be distributed to such holder as expressly provided for in the Plan. As of the Effective Date,
 22 all Entities are precluded from asserting against any assets that are distributed or to be
 23 distributed under the Plan any Claims, rights, causes of action, liabilities or interests based
 24 upon any act or omission, transaction or other activity of any kind or nature that occurred
 25 prior to the Effective Date, other than as expressly provided in the Plan or Confirmation
 26 Order, regardless of the filing, lack of filing, allowance or disallowance of such a Claim or
 27 Equity Interest and regardless of whether such an Entity has voted to accept the Plan.
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1 Except as otherwise provided in the Plan or the Confirmation Order, on and after the
2 Effective Date all Entities that have held, currently hold or may hold a debt, Claim, other
3 liability or Equity Interest against or in the Debtors that would be discharged upon
4 confirmation of the Plan on the Effective Date but for the provisions of section 1141(d)(3) of
5 the Bankruptcy Code shall be permanently enjoined from taking any of the following actions
6 on account of such debt, Claim, liability, Equity Interest or right: (A) commencing or
7 continuing in any manner any action or other proceeding on account of such debt, Claim,
8 liability, Equity Interest or right against assets or proceeds thereof that are to be distributed
9 under the Plan, other than to enforce any right to a distribution with respect to such assets
10 or the proceeds thereof as provided under the Plan; (B) enforcing, attaching, collecting or
11 recovering in any manner any judgment, award, decree, or order against any assets to be
12 distributed to creditors under the Plan, other than as permitted under subparagraph (A)
13 above; and (C) creating, perfecting or enforcing any lien or encumbrance against any assets
14 to be distributed under the Plan, other than as permitted by the Plan, provided that nothing
15 contained herein shall limit the rights of any distributee under the Plan from taking any
16 actions in respect of property distributed or to be distributed to it under the Plan.

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18 V.

19 EXECUTORY CONTRACTS AND UNEXPIRED LEASES

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21 A. Assumption.

22 In the Schedule of Executory Contracts and Unexpired Leases Filed and served in
23 accordance with section D of Art. I of the Plan, the Debtors that shall set forth the executory
24 contracts and unexpired leases that are to be assumed or assumed and assigned effective upon the
25 Effective Date, and shall specify the Cure Payment, if any, that the Debtors believe must be
26 tendered on the Effective Date, in order to provide compensation in accordance with section
27 365(b)(1)(A) and (B) of the Bankruptcy Code.
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